SOME THOUGHTS ON THE LIMITING OF YOUNGER V. HARRIS

MICHAEL E. GELTNER*

From the time that the Supreme Court of the United States, writing through Chief Justice Marshall in *United States v. Peters*,[1] confirmed the supremacy of judgments of the United States district courts over agencies of state government, restriction of district court powers has been a continuing objective of the states' righters. In recent years, with the expansion of district court interference in state prosecutions following *Dombrowski v. Pfister*,[2] constitutional decisions of the district courts have become a most important mode of restricting the power of state government. It was then to be expected that the Supreme Court would be faced with a broad challenge to the continuing level of district court activity in that area. In February, 1971, after a period in which change was in the wind,[3] the Supreme Court filed decisions in six cases dealing with district court power to interfere with enforcement of state criminal laws.[4]

Lack of unanimity among the members of the Court was reflected in the 17 separate opinions filed in the six cases.[5] It was at least common ground, however, that the Court narrowed the apparent meaning of its earlier decision in *Dombrowski v. Pfister*,[6] and repudiated a growing body of lower court law[7] which held that a claim of facial unconstitutionality of a state criminal statute on first amendment related grounds was sufficient

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* Associate Professor of Law, The Ohio State University College of Law.

1 9 U.S. (5 Cranch) 115 (1809).

2 380 U.S. 479 (1965).

3 *See, e.g.*, Dexter v. Schrunk, 400 U.S. 1207 (1970) (opinion of Mr. Justice Douglas, as Circuit Justice, denying application for a restraining order based upon Dombrowski v. Pfister, 380 U.S. 479 (1965) on the ground that it was "up for re-examination in cases set for reargument this fall").

4 Younger v. Harris, 401 U.S. 37 (1971), *rev'g* Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968); Samuels v. Mackell, 401 U.S. 66 (1971), *aff'g* 288 F. Supp. 348 (S.D. N.Y. 1968); Boyle v. Landry, 401 U.S. 77 (1971), *rev'g* Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968); Perez v. Ledesma, 401 U.S. 82 (1971), *rev'g in part and vacating and remanding in part*, Delta Book Distributors v. Cronvich, 304 F. Supp. 662 (E.D. La. 1969); Dyson v. Stein, 401 U.S. 200 (1971), *vacating and remanding*, Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex. 1969); Byrne v. Karalexis, 401 U.S. 216 (1971), *vacating and remanding*, Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969). To simplify discussion, except when considering specific cases, I will refer to these cases collectively under the name of the first case reported in the United States Reports, *Younger v. Harris*, the name under which they are most often discussed.

5 *Supra* note 4.

6 380 U.S. 479 (1965). The Court may have done the same with less fanfare in Cameron v. Johnson, 390 U.S. 611 (1968).

7 *See, e.g.*, P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757 (D. Mass. 1970); Strasser v. Doorley, 309 F. Supp 716, 722 (D.R.I. 1970) (municipal ordinance); Morrison v. Wilson, 307 F. Supp. 196 (N.D. Fla. 1969); Entertainment Ventures, Inc. v. Brewer, 306 F. Supp. 802 (M.D. Ala. 1969).

in itself to cause a United States district court to reach the merits of an unconstitutionality claim.[8]

It is the purpose of this article to consider, more generally, whether *Younger v. Harris* and the other decisions are likely to substantially change the powers of United States district courts when dealing with the conduct of state government or whether, on the contrary, the view that the Supreme Court has committed itself to ending the active role of the district courts in using federal remedies to control state legislative, executive and administrative action is erroneous.[9]

At this point, it seems appropriate to state the outline of my position and the philosophical orientation behind it. I believe that the *Younger* decisions affect only the narrow subject of when a federal district court can grant coercive relief against state prosecutions and are properly confined to two kinds of cases. The first of these are cases in which a plaintiff in a federal court action seeks an injunction or declaratory judgment against enforcement based on asserted unconstitutionality, of a state *criminal* statute or ordinance. In such a case, I believe, the Court has held that the plaintiff must be prepared to show more than that inhibitions have arisen as a result of the existence of the statute.[10] The other kind of case is one in which a state criminal charge is pending against the person who becomes the plaintiff in an action in a federal district court seeking to enjoin the state authorities from continuing the prosecution.[11] In such a case, I believe, the Court has merely held that, unless there are exceptional circumstances, a district court may not reach the merits without first finding that the prosecution was brought in bad faith. I do not believe that the Court made any other new law. The holdings just mentioned should properly be stated so as to reflect the tentative nature of the Court's position; they do not limit instances of relief against state prosecutions solely to bad faith situations, because of the "exceptional circumstances" language.[12] Moreover, the decisions have little or no application in cases

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[8] Such consideration would ordinarily come before a three-judge district court. 28 U.S.C. § 2281 (1964). *But see, e.g.*, Strasser v. Doorley, 309 F. Supp. 716 (D.R.I. 1970) (single judge considering constitutional challenge to municipal ordinance); Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968), *rev'd sub. nom.*, Boyle v. Landry, 401 U.S. 77 (1971) (portion of case dealing with challenge to municipal ordinances; remainder of claims heard by three-judge court).

[9] I have framed the issue so broadly because, in discussions with lawyers on both sides of the issue, the ultimate question, as they see it, is whether the doors of the federal courts will be shut to the whole class of cases.

[10] I will consider below whether this holding is based on doctrines of ripeness, standing or equity jurisprudence. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 42 (1971) (opinion of Black, J.).

[11] Sometimes, the objectives of such a case may also be accomplished by a declaratory judgment. *See* Perez v. Ledesma, 401 U.S. 82, 93, 98 *et seq.* (1971).

[12] Justice Black, writing for a majority in Younger v. Harris, 401 U.S. 37 (1971), used the words "any other unusual circumstance that would call for equitable relief." 401 U.S. at 54. Justice Stewart, concurring, wrote "in exceptional and extremely limited circumstances." 401 U.S. at 56.

other than the kind just mentioned and should not be read to further limit district court power.

My belief that the *Younger* decisions should be read restrictively is, in part, based upon my belief that an unshackled federal judiciary is a necessary prerequisite to a viable body of personal liberties under our federal system of government. Federal district judges, secure in their lifetime appointments and, hopefully, insulated from the pressures on officials close to the political processes, are capable of an honest approach to constitutional issues. I have seen no evidence that, as a general matter, the state judiciary has similar capacity. On the contrary, the need of most state judges to stand for re-election, the continuing influence of political parties in the selection process, and the relatively small districts in which state lower court judges run for office reflects a system designed to foster maximum receptiveness to the views of a local majority. Furthermore, the Supreme Court's caseload has expanded to the point where it cannot be expected to review all of the cases filed from state courts which involve arguably meritorious claims of civil rights violations. Thus, continued district court activity is needed to assure that the conduct of state governments is faithful to the guarantees of liberties provided by the Constitution.[13]

I. THE CASES

A. *Younger v. Harris*

Younger v. Harris,[14] was an action to enjoin enforcement of The California Syndicalism Act,[15] which the Supreme Court had upheld in *Whitney v. California* in 1927.[16] The Act provided criminal penalties for a

[13] My perspective on some of these issues has been affected by participation, of counsel, in several cases arising out of the Kent State University shootings of May 4, 1970 which involve some of the issues which will be touched upon in this piece. King v. Jones, 319 F. Supp. 653 (N.D. Ohio 1970), *rev'd*, No. 71-0194 (6th Cir. Oct. 22, 1971) is a federal court action seeking to enjoin state court judges from enforcing two injunctive orders, one against public statements by grand jury witnesses and one against picketing, pamphleteering and other speech-related conduct in the vicinity of a courthouse. Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio 1971), *aff'd*, No. 71-1278 (6th Cir. Oct. 22, 1971) (as amicus curiae) is a federal court action seeking to enjoin state authorities from prosecuting persons indicted by a state grand jury which, simultaneous with the indictments, filed a grand jury report which, it is claimed, compromised the state court defendants' opportunity for a fair trial. Morgan v. Rhodes, No. C70-961, (N.D. Ohio March 4, 1971) (granting motion to dismiss), No. 71-1335 (6th Cir. filed April 29, 1971) is an action seeking injunctive and declaratory relief against a series of National Guard practices asserted to violate the United States Constitution. Morgan v. Hayth, No. C70-691 (N.D. Ohio filed Aug. 1970) is an action seeking injunctive and declaratory relief on constitutional grounds against searches of college dormitory rooms by state and local officials. Fridrich v. Brown, No. C71-140 (N.D. Ohio, filed Feb. 11, 1971) is an action seeking declaratory and injunctive relief on constitutional and federal statutory grounds against enforcement of a provision of state election laws.

[14] 401 U.S. 37 (1971).

[15] CAL. PENAL CODE §§ 11400, 11401 (1970).

[16] 274 U.S. 357 (1927).

series of activities, including "teaching, advocating," and "deliberate justification" of syndicalism, which it defined as criminal violence to effect political change. The district court, in *Younger*, held the act to be facially unconstitutional on overbreadth and vagueness grounds. About a year later, the Supreme Court unanimously invalidated an almost identical statute on appeal from a decision of the Supreme Court of Ohio[17] affirming a conviction under it. Thus, when the Court heard argument in *Younger v. Harris* on the prosecutor's appeal from the district court, the threshhold jurisdictional questions were clearly presented.

Harris was indicted under the California Syndicalism Act and brought suit in the district court to enjoin his own prosecution. Dan and Hirsch intervened in the suit, seeking a declaratory judgment of the unconstitutionality of the Act and alleging that they were members of a socialist political party and would be inhibited in the exercise of their first amendment right of peaceful advocacy unless relief were granted. Another intervenor, Broslawsky, a history instructor, joined this request on the ground that Harris' prosecution and the existence of the Act inhibited his teaching about the doctrines of Karl Marx and other revolutionaries. The district court did not state whether the latter three plaintiffs were seeking a stop to the *Harris* prosecution based solely on the Harris example, but simply issued a declaratory judgment as to all instances of use of the Act and enjoined prosecution of the pending case against Harris.[18]

Eight members of the Supreme Court concurred in the reversal decision. Justice Black, writing for the majority,[19] first concluded that the action had to be dismissed as to Dan, Hirsch and Broslawsky, because they were not proper persons to seek relief. While Justice Black stated quite clearly that a "feeling of inhibition" is insufficient basis for relief, he did little more to articulate the precise reason or reasons why such an allegation, if proved, is insufficient basis for relief when joined with a claim of facial unconstitutionality of a state statute on first amendment grounds.[20] At least seven members of the Court agreed with Justice Black on this issue.[21]

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[17] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam), *rev'g* Whitney v. California, 274 U.S. 357 (1927).

[18] Harris v. Younger, 281 F. Supp. 507 (C.D. Cal. 1968), discussion of relief at 516-517.

[19] Justice Black's opinion was for the Court, a majority consisting of the Chief Justice and Justices Blackmun, Harlan and Stewart. The latter, however, joined by Justice Harlan, filed a separate concurring opinion setting forth a separate and probably more restricted, position, in *Samuels v. Mackell, Dyson v. Stein* and *Byrne v. Karalexis*, *supra*, note 4.

[20] The one case cited in support was Golden v. Zwickler, 394 U.S. 103 (1969), in which the court found the action moot and, as a consequence, held that there was no actual controversy, a limitation based upon article III of the Constitution and, therefore applicable both to injunction actions and actions under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1964). *Cf.* Perez v. Ledesma, 401 U.S. at 98 *et seq.* (opinion of Justice Brennan dealing with pertinence of Declaratory Judgment Act). Citation of *Golden v. Zwickler* would suggest that the decision here was based on ripeness grounds. *See also* opinion of Justice Brennan, 401 U.S. at 57-58. How-

The more difficult issue in the case was whether Harris' claim that he was being prosecuted under a facially unconstitutional state statute was sufficient to fall within an exception to the Anti-Injunction Act,[22] which prohibits a federal court from issuing injunctions "to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Harris' contention was that the Civil Rights Act[23] is an "expressly authorized" exception to the Anti-Injunction Act and that, in any action satisfying the requirements of the former Act, relief must be granted irrespective of the latter Act.[24] Justice Black, however, did not directly treat the Civil Rights Act contention as dispositive. Rather, he assumed that an action meeting the prerequisites for injunctive relief, namely a unique showing of "irreparable damages," would satisfy "a judicial exception"[25] to the Anti-Injunction Act.[26] He held, however, that a claim of facial unconstitutionality was not enough and that Harris' failure to allege that the prosecution was brought in bad faith or for purposes of harassment or fell within "any other unusual circumstances that would call for equitable relief" precluded the Court from reaching

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ever, the language used, *see* 401 U.S. at 42, tends to suggest a mere holding on when equitable relief is proper, jurisdiction having already attached.

[21] Justice Douglas, dissenting in *Younger v. Harris* and *Boyle v. Landry*, 401 U.S. 58 *et seq.* (1971) was in disagreement with the court's decision in both cases, but nowhere states flatly that he would consider Dan, Hirsch or Broslawsky to be proper plaintiffs.

[22] 28 U.S.C. § 2283 (1964).

[23] 42 U.S.C. § 1983 (1964).

[24] Although the issue rarely comes up in the courts of appeals, a split seems to have developed in the circuits as to whether the Civil Rights Act, 42 U.S.C. § 1983 (1964), is an expressly authorized exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1964). *Compare* Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970), Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969), Machesky v. Bizzell, 414 F. 2d 283 (5th Cir. 1969) *and* Cooper v. Hutchinson, 184 F. 2d 119 (3d Cir. 1950) *with* Baines v. Danville, 337 F. 2d 579 (4th Cir. 1964), Goss v. Illinois, 312 F. 2d 257 (7th Cir. 1963) *and* McLucas v. Palmer, 427 F. 2d 239 (2d Cir. 1970), *aff'g* 309 F. Supp. 1353 (D. Conn. 1970). *See generally* Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535 (1970).

[25] 401 U.S. at 43.

[26] This conclusion is not indisputable. Justice Black's opinion noted a "judicial exception" to the policy against enjoining State criminal proceedings for cases in which, in the absence of injunctive relief, irreparable harm will be suffered, *citing Ex parte* Young, 209 U.S. 123 (1908). It would follow from that position that, if a case for injunctive relief were made out in an action under the Civil Rights Act, 42 U.S.C. § 1983 (1964), the Anti-Injunction Act would be no bar. That conclusion is supported by the fact that, in Byrne v. Karalexis, 401 U.S. 216 (1971) and Dyson v. Stein, 401 U.S. 200 (1971), the Court vacated and remanded for a finding on whether "irreparable harm", as defined in the decisions, was present. It would be futile to remand if the Court were to later hold that, even if the appropriate findings were made, the district court could not act.

Nevertheless, Justice Black concluded by writing that "[W]e have no occasion to consider whether 28 U.S.C. § 2283 . . . would in and of itself be controlling . . . ." 401 U.S. at 54, and Justice Stewart, concurring wrote, "Thus we do not decide . . . whether an injunction to stay proceedings in a state court is 'expressly authorized' by § 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983." *Id.* at 55. *See also* n.3 at 56. Moreover, Justice Douglas, dissenting in *Younger*, treats the majority as having rejected the position. *Id.* at 60-61. *See also* LeFlore v. Robinson, 446 F.2d 715, 716, 718 (5th Cir. 1971) (Goldberg J., concurring).

the merits of his claim.[27] The key to Justice Black's opinion for the Court was his position that basic concepts of equity jurisprudence determined whether or not relief was available and that the absence of an adequate remedy at law and the threat of serious irreparable harm if relief were denied were prerequisites to the granting of relief. Prosecutions brought in bad faith or solely for the purposes of harassment were, according to Justice Black, instances of "irreparable damage" serious enough to warrant an equity court to act.

Justice Stewart's separate concurring opinion[28] differed little from the Court's except to point out the very narrow nature of the issue before the Court. He emphasized his view that, while federalism would ordinarily preclude the enjoining of state criminal proceedings, where the state's law enforcement was itself lawless, as in a prosecution brought in bad faith or to harass, the reasons to defer to state adjudication were outweighed by the injury caused "by the perversion of the very process which is supposed to provide vindication."[29]

Justice Douglas' dissent, covering both *Younger* and *Boyle v. Landry*,[30] argued that the Court was overruling *Dombrowski v. Pfister*,[31] in rejecting the view, apparently adopted by a majority in the latter case, that the inhibition of protected speech caused by the existence of a statute which overbroadly punished both protected and unprotected activity was itself sufficient basis for relief.[32] He was, of course, correct that the Court, in *Younger*, was retreating from the position apparently accepted in *Dombrowski*, although Justice Black's opinion in *Younger* characterized the *Dombrowski* language as "statements [which] were unnecessary to the decision. . . ."[33] Interestingly, neither Justice Douglas nor Justice Black discussed what might have been the most serious issue in *Dombrowski*, which was whether there should be abstention by the district court when overbreadth in violation of the first amendment is claimed,

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[27] 401 U.S. at 54.

[28] For himself and Justice Harlan.

[29] 401 U.S. at 56.

[30] 401 U.S. 77 (1971).

[31] 380 U.S. 479 (1965).

[32] *Dombrowski*, of course, was a case in which the injunction action was filed in the district court prior to the commencement of criminal proceedings in any state court, although the latter were threatened at the time. It was thus a perfect case for injunctive relief under equity concepts and did not raise any problems under 28 U.S.C. § 2283 (1964), because, as the Court pointed out, 380 U.S. at 484 n.2, that section was no bar to enjoining future, as opposed to pending state criminal prosecutions. In the period between *Dombrowski* and *Younger*, it was a much disputed issue as to whether, in an action otherwise satisfying the elements of *Dombrowski*, but commenced after the formal start of state proceedings, 28 U.S.C. § 2283 precluded relief, a point raised but not decided in Cameron v. Johnson, 381 U.S. 741 (1965), *on remand* 262 F. Supp. 873 (S.D. Miss.), *aff'd*, 390 U.S. 611 (1968). *See, e.g.*, Sheridan v. Garrison, 415 F.2d 699, 704 (5th Cir. 1969); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Dawkins v. Green, 412 F. 2d 644 (5th Cir. 1969); Baines v. Danville, 337 F. 2d 579, 593 (4th Cir. 1964); Honey v. Goodman, 432 F. 2d 333, 338-339 (6th Cir. 1970) (citing district court decisions on point).

[33] 401 U.S. at 50.

so as to permit the state courts to restrict the meaning of the state statute and, possibly, avoid the need for federal intervention.[34]

B. *Boyle v. Landry*[35]

The Justices lined up in the same order in *Boyle* as in *Younger* and treated the reversal decision as flowing without difficulty from the result in the latter case. The plaintiffs had brought an action in the district court seeking a declaratory judgment and injunction against enforcement of several Illinois statutes on the ground that they were unconstitutional.[36] They alleged that some of them had been arrested and were being prosecuted under the statutes, and that first amendment rights of Negroes were being infringed by the inhibitory effect of use of the statutes against the Negro Community through unlawful arrests and the setting of excessive bail. They also alleged that threatened enforcement was a result of a ". . . plan or scheme of concerted action . . . not with an expectation of securing valid convictions, but rather . . . to harass plaintiffs and their supporters and to discourage them from asserting and exercising their federal rights."[37]

Justice Black noted that none of the plaintiffs had ever been prosecuted, arrested or charged under the statute before the Court[38] and therefore concluded that they were like plaintiffs Dan, Hirsch and Broslawsky in *Younger v. Harris*, and reversed on that ground. In one respect, this decision seems to be the weakest of the six cases, since the reversal apparently precluded relief even if the plaintiffs were to come forward with an offer of proof to support the allegations.[39] The district court had not made findings on the allegations or held an evidentiary hearing because it felt them to be unnecessary as a prerequisite to reaching the constitutional claims. Thus, it would seem that dismissal of the case was ac-

[34] Justice Harlan's dissent in Dombrowski v. Pfister, 380 U.S. 479, 498 *et seq.* (1965) was based on the view that, since the contention was unconstitutional overbreadth, the district court should have abstained to permit the state courts to place a narrowing construction on the state statute.

[35] 401 U.S. 77 (1971).

[36] ILL. REV. STAT. ch. 38, § 25-1 (mob action) (1971), § 31-1 (resisting arrest) (1971), § 12-2 (aggravated assault) (1971), § 12-4 (aggravated battery) (1971), § 12-6 (intimidation) (1971). A portion of the action claimed unconstitutionality of ordinances of the City of Chicago dealing with disorderly conduct and resisting or interferring with police officers. The district judge severed the ordinance portion of the case from the challenge to the statutes, sending only the latter before a three-judge court. Landry v. Daley, 280 F. Supp. 968 (N.D. Ill. 1968). As a result, his decision as to the ordinances was not before the Court on the appeal from the decision of the three-judge court.

[37] Landry v. Daley, 280 F. Supp. 929, 931-32 (N.D. Ill. 1967) (opinion of Will, D. J., summarizing complaint).

[38] The State's appeal was only from the decision below holding the intimidation statute invalid.

[39] In both Dyson v. Stein, 401 U.S. 200 (1971) and Byrne v. Karalexis, 401 U.S. 216 (1971) the lower court decisions were vacated and remanded for evidentiary hearings, rather than reversed outright, as was *Boyle*.

tually a holding that, in actions to enjoin enforcement of state criminal laws, detailed factual allegations, possibly following the lines of the "irreparable harm" criteria set forth in *Younger*, will be required. As a general matter, such a formalistic pleading requirement has been rejected as anachronistic and inconsistent with the notice aspect of the Federal Rules of Civil Procedure.[40] Only Justice Douglas, however, considered this point, and he only touched on it peripherally.[41]

C. *Samuels v. Mackell*[42]

Whereas the *Boyle* plaintiffs were treated like plaintiffs Dan, Hirsch and Broslawsky in *Younger*, the *Samuels* plaintiffs were treated like Harris. Indictments had been filed against Samuels and others charging violation of the New York criminal anarchy statute. Their action in federal court, seeking both injunctive and declaratory relief, was based upon the claim that the statute abridged first amendment freedoms and, while there was a harassment allegation, the claim was premised upon the district courts' ability to enjoin if it agreed with the assertion of unconstitutionality. Following *Younger v. Harris*,[43] Justice Black held that the failure to show irreparable harm of the kind required by that decision precluded injunctive relief and, in addition, the same considerations which required the denial of equitable relief likewise required denial of a declaratory judgment.[44] Thus, the Court rejected the notion that, while enjoining a particular state prosecution might be inappropriate, a declaratory judgment did not fall within the Anti-Injunction Act's proscription of "injunction[s] to stay proceedings in a State court."[45]

D. *Perez v. Ledesma*[46]

The district court plaintiffs operated a newsstand in Louisiana selling publications which local authorities thought were obscene. That thought led to the filing of four informations in state court based upon a state statute and a local ordinance. Plaintiffs were arrested and the alleged obscene materials seized prior to the federal court action. A three judge

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[40] *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411, 421-422 (1969) (action under 42 U.S.C. § 1983 (1964)); Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 174-175 (1965); Conley v. Gibson, 355 U.S. 41 (1957); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944); Chiaffitelli v. Dettmer Hospital, 437 F.2d 429, 431 (6th Cir. 1971).

[41] 401 U.S. at 64.

[42] 401 U.S. 66 (1971).

[43] 401 U.S. 37 (1971).

[44] Unlike Harris, Samuels had joined a claim for a declaratory judgment. 401 U.S. at 69. This conclusion appears inconsistent with one the Court took last year that, for purposes of the three-judge court requirement, 28 U.S.C. § 2281 (1964), a declaratory judgment is unlike an injunction. Gunn v. University Committee to End the War in Viet Nam, 399 U.S. 383 (1970).

[45] 28 U.S.C. § 2283 (1964).

[46] 401 U.S. 82 (1971).

district court held the Louisiana statute constitutional on its face and therefore refused to enjoin the prosecution, but it entered a suppression order and required return of all seized material on the ground that prior to any seizure, an adversary hearing was necessary on the question of whether the materials were in fact obscene.[47] Justice Black, writing for the Court, held that, since the seizure issue was part and parcel of the larger state prosecution, the same irreparable injury had to be shown to support the suppression and return order as would be necessary to enjoin the prosecution.[48] Justice Brennan's dissenting opinion, with Justices White and Marshall concurring, was directed at the question of whether, a claim for a declaratory judgment having been made as to the ordinance, a district court could properly consider its constitutionality when an irreparable harm case had not been made.[49] His position was that, in a case in which there was an actual controversy sufficient to satisfy article III of the Constitution and the Declaratory Judgment Act, and there was no pending state prosecution in which constitutional defenses could be vindicated,[50] then a federal declaratory judgment was appropriate irrespective of the presence or absence of bad faith, harassment or the other exceptional circumstances. Justice Brennan thus finally reached the most obvious point raised in *Younger v. Harris* but not resolved there, namely, whether in a suit otherwise meeting the requirements of *Dombrowski v. Pfister*,[51] the Anti-Injunction Act was a bar to suit. His suggested resolution was as follows: Where a state proceeding is pending, the Anti-Injunction Act is a bar unless the irreparable injury requirement of *Younger* is met. In the other kind of case envisioned in *Dombrowski*—one involving a state statute which is facially unconstitutional—a pending prosecution is a bar.[52] The absence of a pending prosecution, however, together with the requisite elements for a live controversy, would leave the way open for federal court relief on constitutional grounds, and the declaratory judgment would ordinarily be the appropriate remedy in the absence of the irreparable harm and lack of an alternative remedy needed for equitable relief.[53]

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[47] *See, e.g.*, Adler v. Pomerleau, 313 F. Supp. 277 (D. Md. 1970); City News Center v. Carson, 310 F. Supp. 1018 (M.D. Fla. 1970).

[48] This view was strongly supported by the Court's earlier decision in Stefanelli v. Menard, 342 U.S. 117 (1951).

[49] The majority did not reach this question because, since an ordinance was involved and since the action below was a declaratory judgment, a three-judge court was inappropriate and, therefore, they concluded that direct appeal to the Supreme Court was improper. 28 U.S.C. § 1253 (1964). *See* Gunn v. University Committee to End the War in Viet Nam, 399 U.S. 383 (1970); Moody v. Flowers, 387 U.S. 97 (1967).

[50] The state had filed a *nolle prosequi* of the informations before the three-judge court convened. 401 U.S. at 103.

[51] 380 U.S. 479 (1965).

[52] 401 U.S. at 121-22.

[53] This suggestion has a good deal of surface appeal as a half-way compromise between the

Both *Dyson v. Stein*[54] and *Byrne v. Karalexis*[55] involved fact situations which, in light of the four decisions just discussed, required factual findings on whether, in the former, there was bad faith or harassment and, in the latter, whether there existed an adequate single proceeding in the state court which could provide the requisite relief.

II. POST-YOUNGER PROSPECTS

There is no question that, within their confines, the *Younger* decisions will have a most profound effect on district court activity. The area most directly affected, obviously, will involve challenges to the constitutionality of state criminal statutes. These cases fall into several categories.

A. *Actions Commenced Prior to Any Significant Threat of Enforcement*

One type of "challenge" case which was brought following the receptiveness evidenced by *Dombrowski v. Pfister*,[56] was the case in which a state criminal statute was the target of an action by the plaintiff or plaintiffs because, while the statute had not been invoked against them in any sense, they believed it to be a significant threat to their activities.[57] This type of case may call to mind Justice Black's image of a group of plaintiffs scouring the statute books in search of a statute to attack.[58] It may have been theoretically possible, without more, after *Dombrowski*, to seek injunctive or declaratory relief against a state criminal statute alleged to be vague, overbroad and, therefore, unconstitutional on its face. In fact, however, such an action remained difficult to maintain in a federal court, because of the difficulty of establishing facial unconstitutionality. With the exception of pure vagueness cases,[59] there are very few state

apparently unequivocal, and contradictory language of 42 U.S.C. § 1983 (1964) and 28 U.S.C. § 2283 (1964). Projecting that Justice Douglas might accept such a resolution as superior to the state of affairs existing after *Younger*, there might be four votes on the court for that position today.

[54] 401 U.S. 200 (1971).

[55] 401 U.S. 216 (1971).

[56] 380 U.S. 479 (1965).

[57] An example of such a case is Strasser v. Doorley, 309 F. Supp. 716 (D.R.I. 1970), in which several municipal ordinances dealing with the licensing of newsboys were attacked as infringing the first amendment.

[58] Justice Black's suggestion in *Boyle v. Landry*, 401 U.S. at 81.

[59] In vagueness cases, it had generally been understood that the evil lay in the language of the statute itself and not in its application to particular facts. *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 85-96 (1968). Thus a statute void for vagueness was truly unconstitutional because of the way it was written rather than the conduct it affected. It could be challenged at the behest of even one whose conduct was controllable under a law drafted differently. The Court last year threw some further confusion into this area. *Compare* Coates v. Cincinnati, 402 U.S. 611 (1971) *and* Cohen v. California, 403 U.S. 15 (1971) *with* Palmer v. Euclid, 402 U.S. 544 (1971) *and* United States v. Vuitch, 402 U.S. 62, 73 (1971) (White, J., concurring). *But see* Palmer v. Euclid, 402 U.S. 544, 546 (1971) (Stewart, J., concurring) *and* Winters v. New York, 333 U.S. 507 (1948).

criminal statutes that are not susceptible of either a narrowing interpretation to avoid application to the party before the court or a constitutional application to some facts, even if they are not those before the court. Thus, there was often an opportunity to abstain or to avoid the merits because the claim of unconstitutionality was really directed to *some* applications of a statute. In either case, an examination of the annotations of reported decisions for the last few years, a possibly biased sample, produces few cases of this type. As I read the decisions in *Younger* and *Boyle*, this sort of action may no longer be maintained, either on article III ripeness grounds, following Justice Brennan's position or on the ground that the immediacy necessary for the intervention of an equity court is lacking, following Justice Black's position.[60]

B. *Actions Commenced After A Significant Threat of Enforcement, but Prior to Any Formal State Court Proceedings*

An instance of relief granted under *Dombrowski* involved cases in which state or local government was preparing or threatening concrete action against an identifiable group or person under a criminal statute and that group or person commenced a federal court action prior to formal commencement of state proceedings. Before *Younger*, such a case appeared particularly attractive, because it followed the factual pattern of *Dombrowski*. This case, too, was rare, since it involved a race to the courthouse which was hard to win because of the way in which state criminal proceedings are often started.[61] Its theoretical availability, however, combined with the spectacle of the result turning on which lawyer gets to which courthouse first, made stronger the argument for allowing similar actions to be commenced after a state prosecution had started. As I read *Younger v. Harris*, this action can no longer be maintained unless the elements requisite for a finding of irreparable harm sufficient to enjoin an already pending proceeding are met. I think that this result follows from the fact that the *Younger* opinion characterizes the issue not as a problem under the Anti-Injunction Act but rather as one common to all equity actions of the general type.[62] In a way, the symmetry of this

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[60] Here, of course, it is possible to argue that, if article III is satisfied and grounds for an injunction are lacking, a declaratory judgment should still issue, as Justice Brennan, joined by Justices White and Marshall, did in *Perez*, 401 U.S. at 98 *et seq.* *See* text accompanying note 49 *supra*. That argument would depend on the view that the remaining six Justices, in *Perez*, did not reach the point because of their conclusion that the order was not appealable. The problem, of course, is that Justice Black elsewhere characterized the requisites for declaratory relief to be almost identical with those for injunctive relief, Samuels v. Mackell, 401 U.S. at 73, a position which commanded five votes.

[61] *See, e.g.*, Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968); Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970).

[62] Justice Stewart's concurring opinion limits the issue to "a criminal prosecution which is contemporaneously pending in a state court," 401 U.S. at 55, so that it can fairly be said that two of the five majority votes did not go so far and that Justices Brennan, White and Marshall

position seems preferable, although I would have preferred a symmetrical result more along the lines suggested by the dissent in *Younger*.

C. *Actions Commenced in Federal Court While Formal State Proceedings are Actually Pending*

The post-indictment, information or arrest action is, obviously, the core of the issue. Here, there can be little dispute that, prior to the issuance of either injunctive or declaratory relief against enforcement of a criminal statute, irreparable harm must be shown. There may, however, be room for considerable expansion of the instances of irreparable harm beyond the bad faith and harassment standards.

1. What is Bad Faith?

A recent decision of a district court in *Hammond v. Brown*[63] points up some of the problems involved in the bad faith standard. On May 4, 1970, after a weekend of demonstrations and disruptions, Ohio National Guard troops opened fire into a crowd of students on Kent State University's campus, in Portage County, Ohio, killing four and wounding nine, under circumstances in which the legitimacy of the use of deadly force was highly questionable.[64] Local opinion was polarized. Several State officials made strong statements indicating hostility to college students as a group and supporting the actions of the troops. The Governor of the State was publicly criticized in some quarters for having caused the deaths. After a three month delay, he ordered the Attorney General of the State to convene a special grand jury in Portage County to be directed by special prosecutors under the Attorney General's office. The special grand jury ultimately filed indictments, mostly under state riot statutes, covering 25 persons, all of whom, apparently, came from the group of students, university personnel and young persons against whom local sentiment was directed. None of the National Guard troops or State officials were indicted. In fact, at the same time as the indictment, a grand jury report was filed which exonerated the troops and came close to blaming the killings on a general group which included the indicted persons.

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might consider the case appropriate for a declaratory judgment. The logic of the majority position Justice Stewart concurred in would run to the contrary.

[63] *Compare* 323 F. Supp. 326 (N.D. Ohio 1971), *aff'd*, No. 71-1278 (6th Cir.), *with* Adamek v. Brown, No. C 70-1039, on appeal (6th Cir. No. C 71-1279), appeal of defendant dismissed October 5, 1971.

[64] *See, e.g.*, DEPT. OF JUSTICE, SUMMARY OF F.B.I. REPORT ON KENT STATE KILLINGS (July, 1970); KENT STATE UNIVERSITY PRESIDENT'S INQUIRY COMMISSION, MINORITY REPORT (1971); PRESIDENT'S COMMISSION ON CAMPUS UNREST, REPORT ON KENT STATE UNIVERSITY (1970); Akron Beacon Journal, Special Kent State Section, A17-24, May 24, 1970; I. F. STONE, THE KILLINGS AT KENT STATE: HOW MURDER WENT UNPUNISHED, (1970); J. ESTERHAS & M. ROBERTS, THIRTEEN SECONDS: CONFRONTATION AT KENT STATE, (1970); P. DAVIES, AN APPEAL FOR JUSTICE, (1971) (unpublished to date).

Some of the indicted persons brought suit seeking, among other things, to enjoin the conduct of any prosecutions under the indictments on the ground, *inter alia*, that the prosecutions were brought in bad faith by state officials.[65] The evidence adduced in support of the "bad faith" contention included testimony that the grand jury had excluded from its inquiry any consideration of allegations of misconduct by National Guard or governmental officials, and that the special prosecutors had withheld relevant evidence from the grand jurors. Further testimony indicated that the grand jury report was prepared by the special prosecutors and that the Attorney General had held a meeting with the grand jury foreman alone to discuss the content of the grand jury report, which was, in substance, an exoneration of the State government. In addition, the plaintiffs relied on the fact of the simultaneous filing of the grand jury report and indictments and their content, the contention that the Attorney General and special prosecutors must have known of the prejudicial effect on a fair trial of such a report,[66] the claimed motive of the State administration to obtain a public exoneration of its prior conduct and the stated views of some of the prosecutors concerning the legitimacy of the National Guard's conduct. None of the defendants admitted to bad faith or conceded that they were operating out of motives other than the fair enforcement of the State's criminal law. The Court found that there was no proof of bad faith.[67]

Hammond points up several of the problems created by a "bad faith" standard, not the least of which is definitional. It is to be expected that the question, "did you commence the prosecution in bad faith?" will not ordinarily elicit an affirmative answer from state or local officials. Therefore, there must be a workable definition of what state of mind of the prosecutor is the necessary element for an injunction before problems of proof can be considered. I believe this is so because I expect that there will not be a retreat from the rather solid position that mere selectivity in the enforcement of the criminal law is not a basis for the kind of bad faith finding which would abort the proceeding.[68] Selectivity, of course, can be part of the evidentiary basis on which a bad faith finding rests in a particular case,[69] but it does not provide the necessary definitions. Cases

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[65] Although the district court's decision pre-dated *Younger*, the Sixth Circuit, in Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970), had announced similar "bad faith" standards which the district court was applying.

[66] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

[67] 323 F. Supp. at 353.

[68] *See* Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Alarik, 439 F.2d 1349 (8th Cir. 1971). *Cf.* Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967).

[69] The result in *Hammond* would tend to belie that statement, because it would be hard except in obvious cases of racial discrimination, to find greater selectivity. The plaintiffs' inability to tie selective enforcement to other evidence toward a bad faith conclusion was in part a result of the district judge's ruling that he would not permit the federal proceeding to develop into a consideration of the relative weight of the evidence against those indicted to the evidence

preceding *Younger* have tended to focus on either a disingenuous manner of conducting state proceedings[70] or an apparent vendetta[71] as the basis for the bad faith finding. I find the latter impossible to sensibly distinguish from harassment, which I would define, in this context, as "use of the criminal process to intimidate or otherwise prevent another from achieving an objective."[72] It would seem to me that the ultimate focus of the bad faith issue, if it is to have meaning, ought to be on what it is the prosecutor hopes to achieve by commencing the state proceeding.[73] If he has no particular stake in the matter other than to enforce the criminal law, or cannot be shown to have one, it is hard to make a case of bad faith. If, on the other hand, his purpose is to achieve a result other than simply the prevention of conduct which the particular provision of the criminal law was enacted to affect,[74] there is both selectivity and discriminatory purpose of the kind which should abort the proceeding.[75] Proof, of course, will inevitably be difficult in an area in which a purpose must be inferred from conduct which, on its face, is arguably legitimate, especially when few admissions of guilt can be expected. It is, however, a normal matter to deduce a state of mind from circumstantial evidence[76] and has already been done in this context.[77]

against those not indicted. 323 F. Supp. at 337. *Cf.* Costello v. United States, 350 U.S. 559, 563 (1956).

[70] *See, e.g.*, Grove Press, Inc. v. Philadelphia, 418 F.2d 82 (3d Cir. 1969).

[71] *See, e.g.*, Sokol v. Perez, 289 F. Supp. 392 (E.D. La. 1968) *and* Duncan v. Perez, 321 F. Supp. 181 (E.D. La. 1970), *aff'd*, 445 F.2d 557 (5th Cir. 1971). *See also* Dombrowski v. Pfister, 380 U.S. 479 (1965). *Cf.* Jenkins v. McKeithen, 395 U.S. 411 (1969).

[72] *See, e.g.*, Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971); Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970); Sheridan v. Garrison, 415 F.2d 699 (5th Cir. 1969); Taylor v. Selma, 327 F. Supp. 1191 (S.D. Ala. 1971). I would thus treat multiple prosecutions, standing alone, as different from harassment or bad faith. *See, e.g.*, P.B.I.C. v. Byrne, 313 F. Supp. 757 (D. Mass. 1970). Such prosecutions might very likely be a separate instance of irreparable harm in cases like obscenity prosecutions. *See* Byrne v. Karalexis, 401 U.S. 216 (1971).

[73] This is obviously "motive" analysis, which has always proved incongenial to those used to talking about "intent" or "purpose." *See, e.g.*, State v. Lancaster, 167 Ohio St. 391, 149 N.E.2d 157 (1958). *See also* Palmer v. Thompson, 403 U.S. 217, 243 (1971) (White, J., dissenting).

[74] The harassment-vendetta cases cited note 72 *supra* would fall under this formulation, as would a contention such as the one in *Hammond*, if believed, that a prosecution was brought to exonerate the governor. Furthermore, it might be possible to back into this position by showing that, while motive is not directly proved, it can be inferred in a case in which the prosecution knows it has no hope of securing valid convictions, as when it knows the criminal statute to be unconstitutional. *But cf.* Younger v. Harris, 401 U.S. 37 (1971) (continuing prosecution under statute almost identical to one declared unconstitutional).

[75] In Oyler v. Boles, 368 U.S. 448 (1962), the court rejected the view that the selective enforcement claim before it rose to a constitutional violation, but suggested that if selection was based on race "or other arbitrary classification," a finding of denial of equal protection might be made. 368 U.S. at 456. In a case such as Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio 1971), the nub of the grievance case was as much selectivity as the facial unconstitutionality of the statute.

[76] *See, e.g.*, Screws v. United States, 325 U.S. 91 (1945).

[77] *See, e.g.*, Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968). Since "bad faith" is treated as a factual conclusion to be inferred from the evidence, the district judge assumes greater importance. Whereas, there is no limit to the scope of review of a district court decision on a

2. What Are Other Unusual Circumstances Justifying Injunctive Relief Against A Pending Criminal Proceeding?

As I read the opinions, Justice Black's allusion to "other unusual circumstances that would call for equitable relief,"[78] may contain sufficient elasticity for the district courts to continue to intervene in state criminal proceedings whenever it can fairly be said that a defect in state procedure[79] or the state's prior conduct of the proceedings makes it unlikely that a prompt and fair adjudication can be had. This is especially so in cases involving first amendment facial unconstitutionality claims in which the "chilling effect" on speech referred to in *Dombrowski*[80] may cause irreparable injury. If it is so that the state proceedings appear to be unfair and do not promise speed, a strong case can be made for permitting a federal decision to occur early. The more obvious case is one in which past conduct of governmental officials not amounting to bad faith nevertheless has compromised the state judicial process so as to undermine fair fact finding.[81] Thus, I find persuasive after *Younger* the contention in *Hammond v. Brown*[82] that the participation of a state court judge in the issuance of a grand jury report prejudicial to fair trial because of its tainting effect on the potential venire ought to be an independent ground for relief. This is so because it undermines the basis for confidence in the fairness of the state adjudicatory mechanism. I would expect that many other equally persuasive claims will arise once it sinks in that the focus is no longer on the facial unconstitutionality of the statute but rather the particular case before the court.

3. Relief

The individualized focus of the issue in *Younger* would tend to indi-

claim of unconstitutionality, a finding of "bad faith" is probably reversible only if "clearly erroneous." Rule 52(a), Fed. R. Civ. P. Thus, in two recent "bad faith" decisions, both going different ways, perfunctory affirmances were based upon Rule 52(a). *Compare* Duncan v. Perez, 445 F.2d 557 (5th Cir. 1971), *aff'g* 321 F. Supp. 181 (E.D. La. 1970) *with* Hammond v. Brown, No. 71-1278 (6th Cir. Oct. 22, 1971), *aff'g* 323 F. Supp. 326 (N.D. Ohio 1971). There is, of course, substantial precedent for a broader scope of review of mixed questions of fact and law. *See, e.g.*, Mamiye Bros. v. Barber S. S. Lines, 360 F.2d 774, 776 (2d Cir. 1966); Great Atlantic & Pacific Tea Co. v. Brasileiro, 159 F.2d 661 (2d Cir. 1947).

78 401 U.S. at 54.

79 For example, such as the one raised by Freedman v. Maryland, 380 U.S. 51 (1965). *Cf.* Grove Press, Inc. v. Philadelphia, 418 F.2d 82 (3d Cir. 1969).

80 380 U.S. 479 (1965).

81 The primary interest of the state in avoiding transfer of a constitutional claim from state to federal court ought to be in its control of the fact-finding process relevant to the constitutionality claim. That is, one way or another, state court determinations on claims of statutory unconstitutionality are subject to federal court review, *cf.* Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921), quite possibily at the district court level via habeas corpus petition. It makes a big difference, however, who has found the facts underlying the unconstitutionality claim, especially if the claims are of unconstitutional application. *Cf.* Townsend v. Sain, 372 U.S. 293 (1963).

82 323 F. Supp. 326 (N.D. Ohio 1971), *aff'd*, No. 71-1278 (6th Cir. Oct. 22, 1971). The per curiam opinion did not discuss this point.

cate that relief will be restricted to the case at hand. For example, a plaintiff's claim that a state criminal statute is being misused against him in bad faith by a prosecutor is essentially a dispute between the plaintiff and the prosecutor. The case is thus unlike the simple claim that a particular statute affects one's activities and is facially unconstitutional. The latter instance is an appropriate case for relief enjoining all future prosecutions under the statute or declaring it invalid; the former is an appropriate case for enjoining the particular prosecution or all future prosecutions by that prosecutor under that statute (or related ones) against that plaintiff.[83] There will, of course, be many variations in fact situations, but, in general, it will probably be so that the bad faith aspect of a case is separable from the question of statutory invalidity. Moreover, a claim of irreparable harm based on some fatal deficiency in the state fact-finding process for the particular case would likewise lead toward relief geared only to that case, unless the defect was built into all future enforcement of the statute.

D. *Actions in Federal Court to Enjoin State Civil Proceedings*[84]

I do not believe that district court power to enjoin state civil proceedings is adversely affected by the *Younger* decisions, Justice Stewart was careful to point out the limits of that decision, writing:

> We do not deal with the considerations which should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently.[85]

The focus here must be on state proceedings of a coercive or injunctive nature which affect rights of expression, because it will be rare that the kind of irreparable injury required by *Younger* will be present in an action for money damages.[86] In the former kind of case, I believe that *Younger* strengthens the argument for federal injunctive relief, because

[83] The court in Taylor v. Selma, 327 F. Supp. 1191 (S.D. Ala. 1971) disagrees with this analysis, using harassment in a particular case and the unconstitutionality of the statute as a basis for enjoining all future enforcement. The court noted, "as written, the statute is an easy vehicle for the supression of unpopular causes and thoughts." *Id.* at 1193.

[84] Characterization here as "civil" or "criminal" may be a crucial issue. In King v. Jones, 319 F. Supp. 653 (N.D. Ohio 1970), *rev'd*, No. 71-0194 (6th Cir. Oct. 22, 1971) plaintiffs sought to enjoin enforcement of two "orders" issued by the state court which filed the indictments in issue in *Hammond*. One proscribed public statements by grand jury witnesses and the other prohibited picketing, pamphleteering and other speech-related activities in the area of the courthouse. Plaintiffs, throughout, referred to the documents as "injunctions" and treated the matter as civil. Defendants referred only to "orders" and treated them as incidental to a criminal proceeding. The district court referred to "restraining orders" and issued an injunction. The reversing court of appeals used the "orders" characterization.

[85] 401 U.S. at 55. In a footnote, he pointed out that, historically, injunctions against state civil proceedings have been easier to come by. *Id.*, n.2. *But cf.* Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970).

[86] Such a case will usually be an adequate remedy at law in itself. There may be exceptions, such as a tax action against a newspaper commenced by an order attaching its printing presses, but I would classify such a case as a "coercive proceeding."

I read it as holding that, if irreparable injury is threatened by the withholding of federal relief, the Anti-Injunction Act is no bar to relief. When a federal court is presented with an outstanding state injunction which forbids conduct which is protected by the first amendment, it is dealing with the most obvious kind of irreparable harm. The prior restraint creates a continuing injury to first amendment rights until it is removed.[87] Accordingly, the lower federal courts have shown a pre-*Younger* inclination to grant relief, and I expect it to continue.[88] A special distinction between state civil and criminal proceedings may lie in the fact that determinations of fact and law in criminal cases are theoretically always subject to reopening by petition for writ of habeas corpus.[89] Conversely, under existing law, issues decided or in issue in a state proceeding may not be relitigated in a later federal one.[90]

E. *Civil Rights Actions Not Involving State Criminal or Judicial Process*

Historical restrictions on the granting of federal relief in actions under the Civil Rights Act against the enforcement of state non-criminal statutes, in the absence of Anti-Injunction Act considerations, include the abstention doctrine,[91] a requirement of exhaustion of state or administrative remedies[92] and article III concepts of standing, ripeness and mootness.[93] I can see no way in which such cases are affected by the *Younger* decisions.[94] The suggestions of Justice Harlan's *Dombrowski* dissent that the abstention doctrine had application in an unconstitutional over-

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[87] *See, e.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Carroll v. Princess Anne County, 393 U.S. 175 (1968). For example, if an order similar to the one sought by the federal government in New York Times Co. v. United States, 403 U.S. 713 (1971), were issued by a state court, the irreparable harm would be clear.

[88] *See, e.g.*, Grove Press, Inc. v. Philadelphia, 418 F.2d 82 (3d Cir. 1969); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); King v. Jones, 319 F. Supp. 653 (N.D. Ohio 1970), *rev'd*, No. 71-1094 (6th Cir. Oct. 22, 1971). *But cf.* McLucas v. Palmer, 309 F. Supp. 1353 (D. Conn. 1970), *aff'd*, 427 F.2d 239 (2d Cir. 1970). Since a state injunction cannot be challenged, even on constitutional grounds, in an action for contempt against one who has violated its terms, Walker v. Bermingham, 388 U.S. 307 (1967), a federal injunctive remedy appears most attractive.

[89] *See* Townsend v. Sain, 372 U.S. 293 (1963).

[90] *See* Angel v. Bullington, 330 U.S. 183 (1947). In Florida State Board of Dentistry v. Mack, 401 U.S. 960 (1971), two members of the Court dissented from a denial of certiorari because they wanted to consider the issue of whether a state court determination is res judicata as to a subsequent federal court action under 42 U.S.C. § 1983 (1964).

[91] *See, e.g.*, Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). This doctrine has been only sparingly authorized in actions challenging state statutes on the ground that they infringe upon political rights. *See, e.g.*, Zwickler v. Koota, 389 U.S. 241 (1967); Baggett v. Bullitt, 377 U.S. 360 (1964); Harman v. Forssenius, 380 U.S. 528 (1965).

[92] If applicable at all after McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961). The exhaustion doctrine is very restricted in this context.

[93] *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411 (1969); Tileston v. Ullman, 318 U.S. 44 (1943).

[94] This position was explicitly accepted recently by a panel of the Fifth Circuit in Hobbs v. Thompson, 448 F.2d 456 (5th Cir. 1971).

breadth case involving a criminal statute[95] was never followed up by the *Younger* opinions, none of which consider that issue.

The related kind of Civil Rights Act case is the one in which the plaintiff is complaining about the conduct of state officials rather than the content of state statutes. Here some of the same restrictions exist, and there may be problems concerning the availability or feasibility of relief,[96] but I see nothing in the *Younger* opinions which adversely affects the district courts' power to grant relief in such cases.[97]

III. CONCLUSION

I believe the decision in *Younger v. Harris* and its companion cases was unfortunate, but less so than its advance notices. The federal district courts ought to provide an available remedy for any person with a federal constitutional grievance against a state criminal statute sufficiently concrete to satisfy article III requirements. In this area, unless there is a fair possibility that state courts will interpret a statute to avoid the constitutional problems while still effectuating the legislature's purpose, I see no legitimate interest of our federal system that would require withholding relief. I would say the same where the state criminal process has started to grind, except where the state fact-finding process, operating legitimately, can have an influence on the outcome of the constitutional issue.

Cases of bad faith or "unusual circumstances" involving already-pending state criminal proceedings are different and, here, I believe the two standards just mentioned have sufficient flexibility to be lived with, although particular federal judges' attitudes will be more important in the resolution of each case.

The decisions, however, involve a narrow portion of the much broader area of injunctive relief under the Civil Rights Act. I expect the Supreme Court's new majority to commence a long period of dialogue in that area. I do not think, however, that *Younger v. Harris* is the beginning of the end.

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[95] 380 U.S. at 498.

[96] *See, e.g.*, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); Schnell v. Chicago, 407 F.2d 1084 (7th Cir. 1969).

[97] In Tatum v. Laird, 444 F.2d 947, (D.C. Cir. 1971), an action to enjoin surveillance of political activity, there is a suggestion that *Younger* would enhance the case for relief, because of its emphasis on the absence of available remedies at law. A recent decision of the Court of Appeals for the Third Circuit, in Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) tends to support that prophecy. The plaintiffs brought a class action to enjoin New Jersey State police from harassing long-haired travelers with unreasonable stops and searches. The district court dismissed, citing *Younger* as support for a broadened principle of federal court abstention. The Court of Appeals reversed, noting that the principle built into 42 U.S.C. § 1983 (1964) which requires due respect for a suitor's choice of federal forum "has not been altered by the recent decisions of the Supreme Court in *Younger v. Harris*." 446 F.2d at 1347.